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If You're Hot You're Hot

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KINKO'S LOSES 'PACKET' COPYING CASE

Publishers breathed a sigh of relief recently when a federal trial judge in New York found Kinko's Graphics Corp. liable for extensive copyright violations. While the case has been "closely watched" by the publishing industry, any other result would have been astonishing.

Kinko's operates some 200 photocopy stores nationwide, located mostly near college campuses. Based on "orders" placed by college professors, Kinko's regularly copied excerpts from textbooks, compiled them into course "packets," and sold them to students. The company never obtained any permissions from the textbook publishers, nor paid any copyright license fees.

In the New York case, the packets (or "anthologies") were compiled based on instructions from professors at Columbia, NYU, and the New School as to what readings they needed for their courses. Kinko's then produced 300-400 page packets, including substantial portions of copyrighted books, at a cost of about \$24 to students.

Kinko's admitted the copying but defended it as an "educational" use permitted by the fair use doctrine of copyright law. Kinko's argued that professors across the country depended upon Kinko's to provide up-to-date course materials for their students. Federal judge Constance Baker Motley, however, was unimpressed. "The extent of its insistence that theirs are educational concerns and not profitmaking ones boggles the mind," she wrote. While the use of Kinko's packets by students may have been educational, the company's use of the copyrighted material was clearly "commercial."

Section 107 of the 1976 Copyright Act provides that "fair use" is a defense to infringement and provides several examples of fair use, including "criticism, comment, news reporting, teaching. . . scholarship, or research." But the statute also makes clear that the fairness of the use will be judged by the profit motive involved, the nature of the underlying work, the proportion of material used, and the economic effect on the copyright owner.

The result in this case should hardly be surprising. What is surprising is Kinko's belief that what they were doing was legal! Even the most elementary textbooks on copyright law cite *MacMillan v. King*, an 80 year-old case which rejected precisely the same argument raised by Kinko's. In that case, the federal court rejected the fair use defense when a teacher copied substantial portions of an economics

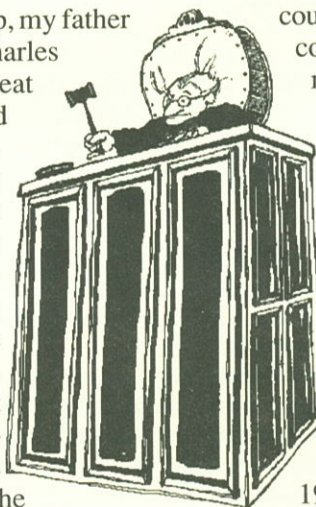
text for use by his students. There, as here, the nature of the copyrighted work — whose only market was expected to be in the educational area — and the extent of the copying far outweighed whatever educational purposes motivated the copying.

There is no doubt that the service provided by Kinko's to the academic community was a valuable one. It's a fine idea to tailor readings to the specific needs of a particular course, but not by supplanting the copyright holder's commercially valuable rights. It should be noted that this case is not about quoting a few sentences or paragraphs from a book for scholarly purposes, nor is it about photocopying one article to send to another library for research purposes. It was about a large commercial venture profiting by disregarding fundamental copyright principles. And that, as they say, is agin' the law.

SUPREME COURT WIPES OFF THE "SWEAT OF THE BROW" DOCTRINES

When I was growing up, my father used to tell me that Charles Laughton was such a great actor that he could read from the New York telephone directory and make an audience weep with emotion. There may or may not have been something special about the Big Apple's directory in those days, but recently the U.S. Supreme Court held that a telephone directory covering northwest Kansas was "devoid of even the slightest trace of creativity." The re-

sult? A death-blow to the long-established copyright doctrine known as the "sweat of the brow" doctrine.



For more than fifty years, federal courts have routinely granted copyright protection to directories of one kind or another as a reward for the hard work that goes into compiling facts. Merely by "sweat of the brow" or "industrious collection," the compiler could acquire a federal copyright. But no more!

In *Feist Publications, Inc. v. Rural Telephone Service Company*, No. 89-1909 (filed March 27, 1991), the Supreme Court concluded

What do you say to your faculty colleagues when they ask about a title they ordered a few months ago and it still has not arrived?

"Well," you reply, "we ordered it right away. Since it had been published recently, we expected it to arrive. Instead, it was reported 'out of print' or 'out of stock indefinitely,' I don't recall which."

OUT-OF-PRINT SEARCHES

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Then you go on to explain that you will have it searched, but the reality is that very little time is available to work with these desiderata and such "new" titles won't end up in the book trade for some time.

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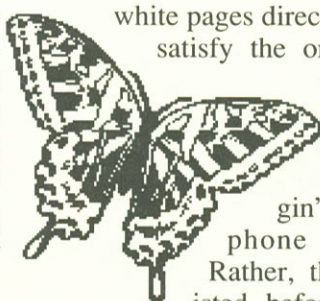
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that the lower courts had "misunderstood the [copyright] statute" and "eschewed the most fundamental axiom of copyright law — that no one may copyright facts or ideas." Speaking for the Court, Justice Sandra Day O'Connor held that "without a doubt, the 'sweat of the brow' doctrine flouted basic copyright principles."

The sine qua non of copyright, the Court emphasized, is "originality," meaning that the work was "independently created by the author" and that it possesses "at least some minimal degree of originality if it features "an original selection or arrangement." No matter how original the format, however, "the facts themselves do not become original through association."

Thus, a subsequent compiler "remains free to use the facts contained in another's publication" to aid in preparing a competing work, "so long as the competing work does not feature the same selection and arrangement."

Applying this analysis to the *Feist* case, the Court concluded that the raw data contained in Rural Telephone's



white pages directory does not satisfy the originality requirement because the data does not "owe its origin" to the telephone company. Rather, the data "existed before Rural reported them and would have continued to exist if Rural had never published a telephone directory."

Similarly, there was no originality in the selection, coordination or arrangement of the facts by Rural Telephone. Its selection of name, town and telephone number "could not have been more obvious." (Indeed, state law required this information to be published by the phone company.) With respect to coordination and arrangement, the Court found "nothing remotely creative about arranging names alphabetically" since it is "an age-old practice, firmly rooted in tradition and so commonplace that it has come to be expected as a matter of course." Such an arrangement is "not only unoriginal, it is practically inevitable."

What does all this mean for the

future? Like many previous Supreme Court decisions, the *Feist* opinion has ended one dispute but raised a host of new ones. Linda Greenhouse of the *New York Times*, for example, has written that the case "has broad potential implications for the computerized information industry and for other publishers of compilations that are essentially factual in nature." On the one hand, existing factual information will be more available for publication and use, but, on the other hand, companies may think twice before making the investment in time and effort to compile factual material.

Much will have to be left to future court decisions, as particular disputes arise. But it may turn out that there is no real problem. (The "selection" and "arrangement" of more complex types of databases, for example, may well be enough to throw a cloak of protection around the entire database.) If a serious problem does develop, however, the U.S. Congress can always step in and restore the pre-*Feist* rule. In the meantime, I think I'll go to a video store and rent an old Charles Laughton movie. ☞